UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-387-30-4053-D2
Issued to: John Patrick Harris

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2107

John Patrick Harris

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 29 December 1976, an Administrative Law Judge of the United States Coast Guard at Chicago admonished Appellant upon finding him guilty of misconduct. The specification found proved alleges that while serving as an Able Seaman on board the SS MORMACRIGEL under authority of the document above captioned, on or about 25 May 1976, Appellant "did... wrongfully fail to turn to, while said vessel was undocking from the port of Recife, Brazil."

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence exhibits consisting of a certified extract of the Shipping Articles from the MORMACRIGEL, a certified extract from the ship's official log, certified copy of the relevant page of the log, and the Investigating Officer's comments and conclusions regarding the exhibits.

In defense, Appellant offered in evidence his own testimony as to the accuracy of the log entries and as to the circumstances surrounding the incident reported in the log.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification has been proved by plea. He then served a written order admonishing Appellant.

The entire decision was served on 28 January 1977. Appeal was timely filed on 7 March 1977.

FINDINGS OF FACT

On 25 May 1976, Appellant was serving as an Able Seaman on board the SS MORMACRIGEL and acting under authority of his document while the ship was departing from the port of Recife, Brazil.

Appellant was called at approximately 2045 for duty, but failed to turn to.

BASES OF APPEAL

Appellant contends that, in effect, his plea of guilty to the charge of wrongfully failing to turn to was improvidently entered. This contention is based on the fact that Appellant was without the advice and assistance of counsel at the hearing, and that his decision to plead guilty was based on a misapprehension of the meaning and effect of the plea. The central issue raised by the appeal, although not clearly stated, is that the Appellant's admitted failure to turn to was not "wrongful," so that the finding of "proved" was error.

APPEARANCE: Appellant pro se.

OPINION

The Administrative Law Judge concluded, because Appellant entered a plea of "guilty," that the specification was proved, and that the plea eliminated "any fact controversy." D&O, at 4. Had the plea been providently entered, after its full meaning and effect has been explained to Appellant, I would agree with this conclusion. I find, however, that the explanation of the plea and its effect by the Administrative Law Judge was so patently inadequate as to render the plea improvident on its face.

Review of the explanation the Appellant was given concerning the meaning and effect of his guilty plea makes it clear that his action was based on the impression, largely fostered by the Administrative Law Judge's statements, that the plea would be appropriate if in fact the Appellant did not turn to R., at 8-9, 23-26. This is particularly clear from the dialogue between the Administrative Law Judge and Appellant at pp. 23-26, including the excerpts set out here:

> THE LAW JUDGE: All right. And this is the charge of which you have pleaded guilty, is that correct, sir?
>
> MR. HARRIS: In part.
>
> THE LAW JUDGE: Now, wait a minute. I cannot take an "in part" plea. You are either guilty to this...specification or not. You have indicated you thought that you have some mitigating circumstances.
>
> MR. HARRIS: Yes, sir.

THE LAW JUDGE: I have explained to you I can do either one of two things: Enter a plea of [not] guilty and hear everything that anybody has to say; if you feel that you were guilty but that you have some mitigating circumstances which should -- do you understand the word "mitigating"? (Emphasis Added.)

MR. HARRIS: Yes, sir.

THE LAW JUDGE: It simply means there should be a lessening of penalty if you were, in fact, guilty, that you did not turn to as required by you. (Emphasis Added.)

MR. HARRIS: Yes, sir.

THE LAW JUDGE: All right. Now, I will go back to your plea. Are you entering a plea of guilty?

MR. HARRIS: Yes.

THE LAW JUDGE: Having accepted that [plea], do you have any explanation of your conduct that might mitigate any penalty that will be given you?

* * * * *

THE LAW JUDGE: It is your contention, then, that you were not called or that if you were called you were in such a sound sleep that you did not hear it?

MR. HARRIS: That's possible.

THE LAW JUDGE: Were you guilty of any contributory element of this? Were you intoxicated when you went to bed, anything of that sort?

MR. HARRIS: No, sir. May I make another statement?

THE LAW JUDGE: Yes.

MR. HARRIS: The trip from Charleston, in part, I was working in a space in the after section of the ship and painting with a toxic, vinyl paint. And I admit I didn't feel too well at times from the breathing in of this paint.....I also worked overtime on this job.... So, perhaps I was sleeping hard.

At no point in the dialogue just quoted (or elsewhere in the record) did the Administrative Law Judge inquire into the possible "wrongfulness" of Appellant's admitted failure to turn to. But the specification was that Appellant did wrongfully fail to turn to.

From the Appellant's unrebutted statements it appears that there is good cause to believe that either Appellant was not called for duty, or that Appellant was ill as a result of performing extra duty and inhaling toxic fumes in a confined work area some hours before the time in question. In either case, it would be inappropriate to classify the failure to turn to as "wrongful."

I have on several occasions stated that it is error for an Administrative Law Judge to accept an improvident guilty plea, and that the appropriate action in such cases is for a plea of not guilty to be entered, and the merits of the case heard. The same duty is established by the regulations at 46 CFR 5.20-75(a) and 5.20-85(b). See Decisions on Appeal 1119, 1187, 1295, 1332, 1477 and 1767, each containing language such as "It is apparent that Appellant's plea of guilty was entered improvidently. Therefore it should have been changed by the Examiner..." (No. 1477).

CONCLUSION

I find that the Administrative Law Judge, by ignoring the question of "wrongfulness," entered in accepting the plea of guilty. The plea was clearly based on a misapprehension of its meaning and effect, and was therefore improvidently entered and improperly accepted. Absent a provident plea of guilty, and given Appellant's unrebutted testimony as to possible causes for the failure to turn to, there is not substantial evidence of a reliable and probative nature from which to find the charge and specification proved. Further, because of the minor nature of the alleged infraction, and the nominal sanction imposed, I feel that a rehearing would be inappropriate.

ORDER

For the reasons stated above, the order of, the Administrative Law Judge dated at Chicago on 29 December 1976 is VACATED, the findings are set aside, and the charge and specifications are DISMISSED.

E. L. PERRY
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 27th day of June 1977.

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